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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

TARLTON AND SON, INC., Employer/Respondent, and ROBERT MUNOZ, An Individual/Charging Party.	Nos. 32-CA-119054; 32-CA-126896 **EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Charging Party hereby files the following Exceptions to the Decision of the Administrative Law Judge ("ALJ").

We object to the use of the term "Mutual Arbitration Policy." It is a one-sided forced arbitration policy. It should referred to as the "Forced Unilateral Arbitration Policy" ("FUAP") We take Exception to using Respondent's one-sided and inappropriate terminology.

No.	**Exception**	**Language**
1.	Page 2, lines 21 – 27	To the failure of ALJ to find that there is at least one truck driver who is engaged in transportation.
2.	Page 2, line 31	To the finding that the Carpenters Union represents tapers or drywall finishers. The ALJ subsequently found that it wasn't necessary to determine exactly which Union represents all employees and the record does not establish the tapers or drywall finishers are represented.
3.	Page 3, line 7	To the reference to California Labor Codes. There is only one California Labor Code. The reference should be "to various provisions of the California Labor Code."

No.	Exception	Language
4.	Page 3, lines 8-11	To the failure of ALJ to find that the lawsuit alleged other violations of the law including failure to pay prevailing wages.
5.	Page 3, lines 13-15	To the failure of ALJ to find that immediately after Respondent received a copy, the Respondent contacted its attorneys.
6.	Page 3, line 24	To the reference "that same day." That was the date that the FUAP was drafted and sent to Tarlton.
7.	Page 3, fn. 2	To the failure of ALJ to expressly find that the representation issue was not resolved as to the drywall tapers and finishers.
8.	Page 4, lines 1-3	Mr. Tarlton did not testify that he discussed "implementing a mutual arbitration policy." He testified that after some time had passed he had discussed the arbitration policy.
9.	Page 4, fn. 6	To the failure of ALJ to find that the survey constituted lawful interrogation about protected concerted activity.
10.	Page 4, fn. 6	To the failure of ALJ to find that the release, settlement agreement or waiver was a violation of Section 8(a)(1) because it was implemented as part of the FUAP.
11.	Page 6, lines 26-29	To the failure of ALJ to find that the FUAP prohibits representative actions. This would include actions under PAGA.
12.	Page 7, line 21	To the failure of ALJ to find that *Murphy Oil* applies to representative actions which are different from class or collective actions.
13.	Page 7, lines 22-23	To the failure of ALJ to find that same doctrine applies to various administrative fora.
14.	Page 7, line 35	To the failure of ALJ to find that arbitration agreements which bar representative actions violate Section 7 and 8(a)(1).
15.	Page 7, line 40 – Page 9, line 2	To the failure of ALJ to find that *Murphy Oil* has effectively overruled *Lutheran Heritage Village – Livonia*.
16.	Page 7, line 40 – Page 9, line 2	To the failure of ALJ to recommend that *Lutheran Heritage Village – Livonia* be overruled. The FUAP should be held invalid if any employee would reasonably construe the language of the FUAP to waive her Section 7 rights or where there is an ambiguity that ambiguity should be construed against an employer.
17.	Page 9, line 13	To the failure of ALJ to find that the FUAP amounts to a retroactive waiver of the rights guaranteed by the NLRA and that violates Section 7.

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18.	Page 9, line 13	To the failure of the ALJ to find that the FUAP is a prospective permanent waiver of rights guaranteed by the NLRA even after the employment relationship ends and thus violates Section 7.
19.	Page 9, lines 18-23	To the failure of ALJ to find that the Employer offered no record evidence or any business justification for the FUAP. The Employer offered no business justification on the record and there isn't any except to eliminate worker rights.
20.	Page 9, lines 25-34	To the failure of the ALJ to find that the application of the FAA to the activity of the FUAP, that is dispute resolution, does not affect interstate commerce. Thus, the application of the FAA to this activity would be unconstitutional since the Commerce Clause does not extend to activity which does not affect interstate commerce.
21.	Page 9, lines 25-34	To the failure of the ALJ to find that the FUAP cannot be applied to all employment because the Commerce Clause does not extend to all employment disputes which may arise.
22.	Page 9, lines 25-34	To the failure of ALJ to find that the Norris La Guardia Act does not expressly prohibit the FUAP or any forced collective wavier or right to bring collective actions either in arbitration or any other fora.
23.	Page 9, lines 25-34	To the failure of ALJ to find that FAA does not apply to the truck driver who is a transportation worker.
24.	Page 9, lines 25-34	To the failure of ALJ to find that where there is a collective bargaining agreement in place covering certain employees. This raises the questions as to whether the FAA applies since the collective bargaining agreement is not an agreement covered by the FAA. The Board must address the question of whether various classifications of employees covered by a collective bargaining agreement are covered by an agreement within the meaning of FAA.
25.	Page 9, lines 25-34	To the failure of ALJ to note that there is no agreement of any kind including an employment agreement applicable to any employees except those governed by the collective bargaining agreement(s). There is no evidence that there is any agreement and therefore the FAA does not apply in the absence of an employment agreement. The unilaterally adopted FUAP not an employment agreement.
26.	Page 9, lines 25-34	To the failure of the ALJ to find that to the extent that the FUAP applies to disputes outside of any collective bargaining agreement for those employees who are represented by he Carpenters that there is no agreement to which the FAA can apply.

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27.	Page 10, lines 4-24	To the failure of the ALJ to find that a union cannot waive the right of employees to file administrative claims or lawsuits collectively over working conditions.
28.	Page 10, lines 4-24	To the failure of ALJ to find that a union cannot waive the right of employees to bring representative or class actions over non waivable individual or collective statutory rights.
29.	Page 10, lines 4-24	To the failure of ALJ to find that even if the Carpenters Union waived the right to bargain over the FUAP, it did not agree to the FUAP and therefore there is no clear, unequivocal wavier or any waiver.
30.	Page 10, lines 26 – Page 11, line 2	To the failure of ALJ to recognize that certain statutory rights are non-waivable including whistle-blower rights. For example, PAGA rights are not waivable and therefore FUAP is unlawful under California law to the extent that it would preclude a representative action under PAGA. It is also unlawful under federal law because it prohibits group claims to federal administrative agencies such as OSHA, DOL, and the Office of Special Counsel of the Justice Department
31.	Page 11, lines 4 -20	To the finding of ALJ that the implementation of the FUAP had an illegal objective. Although the Charging Party agrees that the objective was unlawful, it is not necessary to find any intent or illegal objective to find a violation of Section 8(a)(1). It is only necessary to find the conduct interferes with Section 7 rights without finding any illegal objective. This is a fundamental misstatement of the law. The ALJ should be required to read "Labor Law Analysis and Advocacy" by Robert Gorman and Matthew Finkin.
32.	Page 11, lines 29-44	To the failure of ALJ to find that *Lutheran Heritage Village – Livonia* does not apply or should be overruled or modified.
33.	Page 11, line 40	To the finding of ALJ that there are no "cases directly on point." The cases cited by the ALJ are directly on point.
34.	Page 12, lines 1-11	To the failure of ALJ to recognize that the complaint was brought on behalf of individuals who work are currently employees whether or not the plaintiffs were employees of Tarlton. They remain employees under the Act.
35.	Page 12, lines 23-24	To the suggestion that Tarlton provided "generally sincere, specific and detailed testimony . . .." To the contrary, his testimony was ambiguous and not truthful. Indeed, in subsequent findings the ALJ did not credit Tarlton.
36.	Page 12, fn. 13	To the failure of ALJ to find that the timing alone would be sufficient to establish that the FUAP was implemented in response to protected concerted activity

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37.	Page 13, lines 29-31	To the failure of ALJ to find that the FUAP would not only prevent employees from working together to file lawsuits or other collective actions, it would also prohibit them from engaging in collective boycotts, collective work stoppages, work site civil disobedience or other collective actions which do not involve filing of lawsuits. It is an unlawful forced no-strike clause.
38.	Page 14, lines 29-31	To the failure to find that by prohibiting strikes, work stoppages and other concerted activity, the FUAP violates Section 7.
39.	Page 14, line 8	To the failure of ALJ to find that position statements submitted by the lawyer is an admission also known as confession. And it was not coerced.
40.	Page 14, lines 14-18	To the failure of ALJ to find that the position statement was an admission of the violation of the Act. It is not mere corroboration.
41.	Page 14 to Conclusions of Law	To the failure of ALJ to find that the FUAP interferes with the right of employees to refrain from Section 7 activities such as conditioning the employment of employees on their refraining at the time they sign this rather than from refraining at a subsequent period or point in time. As the FUAP requires employees to refrain at the time they sign the FUAP rather than choose to do so later. ALJ has failed to make a specific conclusion of law in this regard.
42.	Page 14 to Conclusions of Law, passim	To the failure of ALJ to find that the FUAP would prohibit collective actions that are not preempted by the FAA under state law. In particular, see *Iskanian v. C.L.S. Transportation*, 59 Cal.4th 348 (2014), cert. denied, (2014).
43.	Page 14 to Conclusions of Law, passim	To the failure of ALJ to find that that FUAP is unlawful because it would prohibit a group or collective action brought by a union as the representative of employees or an employee. This would include the right of the Union to bring the action as the non-majority representative or members only representative of the employees.
44.	Page 14 to Conclusions of Law, passim	To the failure of ALJ to find that because the Employer allows group claims to be brought before it prior to invoking the FUAP, it has no valid business justification to preclude such group claims in arbitration.
45.	Conclusions of Law	To the failure of ALJ to find that the FUAP is unlawful because it imposes additional and punitive expenses on workers including the costs of arbitration which costs are not imposed on many other fora available to employees.
46.	Conclusions of Law	To the failure of ALJ to find that the FUAP prohibits the exercise of Section 7 rights because it forecloses concerted

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		activity in the form of expressive activity including boycotting, picketing and other lawful protected activities.
47.	Conclusions of Law	The FUAP is invalid because the Employer does not know what it covers and is therefore overbroad.
48.	Conclusions of Law	The FUAP is unlawful because it interferes with Section 7 rights because it extends to parties who are not the employer but maybe the agents of the employer or employers or other employees under the Act.
49.	Conclusions of Law	To the failure of ALJ to find that the FUAP is unlawful and interferes with Section 7 rights because it is mutual and restricts the right of employees to act together, to defend claims brought by the Employer against them. Employees have the right to join together to assist each other to defend claims against themselves.
50.	Conclusions of Law	To the failure of ALJ to find that the FUAP is unlawful, because it contains a confidentiality provision.
51.	Page 14, line 38 – Page 16, line 2	To the remedy in its entirety as being inadequate.
52.	Page 14, line 38-Page 16, line 2	To the failure of the ALJ to require the employer to post permanently the Employee Rights Poster proposed by the Board
53.	Page 14, line 44 – Page 15, line 9	To the failure of ALJ to recommend that the notice be mailed to all employees or former employees.
54.	Page 15, line 24 – Page 16, line 2	To the failure of ALJ to recommend additional remedies cited in her decision which was requested by the Charging Party.
55.	Page 15, line 24 – Page 16, line 2	To the failure of ALJ to recommend rescission of the wavier signed by employees in December 2013 as part of the implementation of the FUAP.
56.	Page 15, lines 24 – Page 16, line 2	To the failure of ALJ to recommend that the Board refer this matter to the Department of Labor to ensure the filing of LM 20, 21 and LM 10 forms.
57.	Page 15, line 24 – Page 16, line 2	To the failure of ALJ to recommend that the notice be read to the employees by a Board agent in the presence of a Union representative. The employees should be paid for this time.
58.	Page 15, line 24-page 16, line 2	To the failure of the ALJ to require the employer to allow employees to read and discuss the notice and Decision on paid work time.
59.	Page 15, line 24 – Page 16, line 2	To the finding by the ALJ that the remedy sought by the Charging Party was extraordinary. The remedies should be considered normal remedies.

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60.	Page 16, lines 9-24	To the failure of ALJ to find that the Employer should cease from requiring employees to sign the FUAP.
61.	Page 16, lines 26-30	To the finding by the ALJ that the Employer should revise the FUAP. The order should be for the FUAP to be rescinded in all its forms and if the Employer chooses later to implement a FUAP, it should do so with one that is lawful. The Board's Order should not be construed as requiring the employer to have and forced arbitration procedure.
62.	Page 16, lines 33-34	To the finding by the ALJ that the Employer could require employees to agree to a revised FUAP. The FUAP was unlawfully implemented and in response to Section 7 activity cannot be revised and re-implemented, having effectuated a complete remedy.
63.	Page 16, lines 34-39	To the limitation imposed in this language to reimburse just the Plaintiffs and Munoz. All individuals who signed an unlawful FUAP should be reimbursed any expenses and legal costs to the extent they incurred them.
64.	Order in its Entirety	To the failure of ALJ to toll the statute of limitations for any claims brought by individuals who may have been dissuaded from bringing such claims by the existence of the FUAP.
65.	Page 16, line 42 – Page 17, line 11	To the failure of ALJ to recommend that the notice be posted for at least the length of time between when the violation occurred and when the notice is posted. A 60-day posting period is inadequate and only encourages respondents to delay. Most other federal or state notices must be posted permanently.
66.	Page 17, lines 9-11	To the failure of ALJ to recommend that the Respondent also mail or provide copies of the Board decision to all current and formal employees. Without the Board decision, they will not be able to understand the notice which is mailed to them.
67.	Page 17, lines 9-11	To the failure of ALJ to require that the notice be sent by United Parcel Service or some other union carrier. The Employer should be prohibited from using a scab carrier like FedEx.
68.	Notice	To the notice in its entirety.
69.	Notice	To the notice in that it does not contain affirmative statement about what the Employer did wrong. The notice should contain a statement to the effect: We have been found to have maintained and unlawfully implemented an arbitration provision. We were found to have violated the law because that arbitration provision prohibits employees from engaging in collective and class actions. We have been ordered to rescind that policy. We

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No.	Exception	Language
		were also found to have unlawfully implemented that policy in response to your protected concerted activity. We regret we have violated your rights.
70.	Notice	To the inclusion of the language allowing the employees to revise the FUAP. The Employer cannot revise the FUAP until it fully remedies all the violations.

Forcefully Submitted and Organize:

Dated: March 10, 2015

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A Professional Corporation

/S/ DAVID A. ROSENFELD
By: DAVID A. ROSENFELD

Attorneys for Charging Party

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CERTIFICATE OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 10, 2015, I served the following documents in the manner described below:

CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 10, 2015, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

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